citizen of Montana for diversity purposes, but it was joined on a compulsory counterclaim so diversity jurisdiction is not destroyed by that fact. See Union Paving Co. v. Downer Corp., 276 F.2d 468, 471 (9th Cir. 1960); H.L. Peterson Co. v. Applewhite, 383 F.2d 430, 433 (5th Cir. 1967). Thus, complete diversity does exist.

B. Interference with Tribal Self-Government

States which have not assumed general civil jurisdiction over Indian tribes play only a limited role in the resolution of

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(footnote 2 cont'd)

through operation of Fort Belknap Ord. No. 2-77, art. V, § 2 (1977), a "sue and be sued" clause in the ordinance establishing the Housing Authority. See also 24 C.F.R. §§ 805.108-.109 & app. I, art. V, § 2.

disputes on the reservation.3/ In Williams v. Lee, 358 U.S. 217 (1959), a non-Indian operating a general store on an Indian reservation brought suit in Arizona state court to collect for goods sold on credit to a tribal member. The Supreme Court held that the Arizona state court had no jurisdiction over the subject matter, since Congress did not grant the court jurisdiction expressly and state jurisdiction would infringe upon "the right of reservation Indians to make their own laws and to be ruled by them." Id. at 220.

In Littell v. Nakai, 344 F.2d 486 (9th Cir. 1965), this court held that Williams also had an impact on diversity actions

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3/ Montana has never assumed general civil jurisdiction over the Indian tribes within its boundaries pursuant to 25 U.S.C. § 1332 or any predecessor statute. The states that have done so are listed in 28 U.S.C. § 1360.

brought in federal court. After we concluded that Littell would have been precluded from suing in state court by Williams v. Lee, we noted that a federal court sitting in diversity operates as an adjunct to a state court and should also be precluded from entertaining the action. Id. at 489 (quoting Woods v. Interstate Realty Co., 337 U.S. 535, 538 (1949). We concluded that federal courts would be divested of diversity jurisdiction whenever the dispute involved the exercise of the tribe's responsibility for self-government. Id. at 489; see Organized Village of Kake v. Egan, 369 U.S. 60, 67-68 (1962).

A tribe's interest in self-government could be implicated in one of two ways. First, if a state or federal court resolves a dispute which was within the province of the tribal courts or of other nonjudicial

law-applying tribal institutions, that court would impinge upon the tribe's right to adjudicate controversies arising within it. Fisher v. District Court, 424 U.S. 382, 387-88 (1976) (per curiam); see Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65-66 (1978). Second, if the dispute itself calls into question the validity or propriety of an act fairly attributable to the tribe as a governmental body, tribal self-government is drawn directly into the controversy. Littell, 344 F.2d at 490.

We have recognized that the tribal court is generally the exclusive forum for the adjudication of disputes affecting the interests of both Indians and non-Indians which arise on the reservation. Snow v. Quinault Indian Nation, 709 F.2d 1319, 1323 (9th Cir. 1983) (quoting Santa Clara Pueblo, 436 U.S. at 65), petition for cert.

filed, 52 U.S.L.W. 3310 (U.S. Oct. 11, 1983). Here, however, at the time of the dispute there is some question of whether the tribe had exercised its right to assume its exclusive jurisdiction. Fort Belknap Law and Order Code ch. I, § 14.1 (1970), states that the tribal court has jurisdiction to hear suits in which the "defendant is a member of the Fort Belknap Indian Community." The word "member" is not precisely defined in the ordinance, and there remains a genuine question as to whether the Housing Authority is contemplated within the jurisdictional statute.4/ Interpretation of a tribal ordinance is one

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4/ The Housing Authority argues that the 1970 code was amended by Fort Belknap Ord. No. 7-77 (1977) and retroactively by Ord. No. 2-80 (1980) so as to give the tribal court jurisdiction. That argument is also more appropriately addressed to the tribal courts for resolution.

of the duties of a tribal court. We are therefore constrained to reverse and remand. The tribal court must first determine its jurisdiction in the matter.

Because of our disposition on this issue, it is unnecessary to decide whether the issuance of the writ of attachment was fairly attributable to the tribe as a governmental body.5/

We emphasize that the Indians in the Fort Belknap community are, and always have been entitled to assume exclusive jurisdiction over civil controversies within the reservation. However, if the dispute itself does not implicate the tribal government and the tribe has decided not to

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5/ We think it appropriate to follow the Supreme Court's pronouncements on the subject of state action in deciding this question. See, e.g., Lugar v. Edmondson Oil Co., 102 S. Ct. 2744, 2754-56 (1982) (discussing the question of whether conduct is "fairly attributable to the state").

exercise its exclusive jurisdiction, it does not follow that the state courts are without power to resolve a controversy occurring within the state but on a reservation. Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); Organized Village of Kake v. Egan, 369 U.S. 60, 75 (1962); see Fisher v. District Court, 424 U.S. 382, 387-88 & nn. 11-12 (1976) (per curiam).6/ By the same token, the federal courts sitting in diversity are not divested of jurisdiction when the tribe has

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6/ Montana was admitted to statehood in 1889 on condition that it disclaim all right and title to jurisdiction over Indian lands. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676, 677. Such a disclaimer was written into the state constitution. Mont. Const. art. I. However, these disclaimers do not force Montana to relinquish governmental or regulatory authority over the lands, only proprietary authority. State ex rel. Iron Bear v. District Court, 162 Mont. 335, 344, 512 P.2d 1292, 1296 (1973); see White Mountain Apache Tribe v. Arizona, 649 F.2d 1274, 1280 (9th Cir. 1981).

not itself manifested an interest in adjudicating the dispute. See Note, State Jurisdiction Over Indians as a Subject of Federal Common Law: The Infringement-Preemption Test, 21 Ariz. L. Rev. 85, 103 (1979); see also id. at 101.

C. Willingness of State to Entertain the Action

We think that the decisions of the Montana Supreme Court lead to the conclusion that Montana state courts would assume jurisdiction over controversies which the tribal courts decline to decide themselves. In State ex rel. Iron Bear v. District Court, 162 Mont. 335, 512 P.2d 1292 (1973), a trail court had determined that it lacked jurisdiction to adjudicate a divorce action between two members of the Fort Pecki reservation. A tribal ordinance, however, had been interpreted by the tribal court as ceding jurisdiction over divorce matters. The state supreme court issued a writ of

mandamus ordering the district court to take jurisdiction, determining that the exercise of state jurisdiction would not interfere with tribal self-government and that the tribal court had not exercised its jurisdiction so as to preempt state jurisdiction. Accord Bad Horse v. Bad Horse, 163 Mont. 445, 450, 517 P.2d 893, 896, cert. denied, 419 U.S. 847 (1974);7/ see also Poitra v. Demarrias, 502 F.2d 23, 29 N.10 (8th Cir. 1974).

IV. Significant Contacts Outside the Reservation

Appellees point out, as an alternative argument for finding diversity jurisdiction, that Indians going beyond reservation

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7/ The tribal court subsequently interpretated the ordinance in question so as to give itself jurisdiction over divorce matters. Relying on that fact, the Montana Supreme Court overruled Bad Horse but adhered to its reasoning in Iron Bear. In re Marriage of Limpy, 636 P.2d 266, 269 (Mont. 1981).

boundaries generally have been held subject to state law. Mescalero Apache Tribe, 411 U.S. at 148-49; Organized Village of Kake, 369 U.S. at 75. The Supreme Court of Montana has held that Montana state courts may assert jurisdiction over a transaction involving an Indian party when that transaction involved "significant contacts with the state outside reservation boundaries." Crawford v. Roy, 176 Mont. 227, 230, 577 P.2d 392, 393 (1978). The Montana courts have accordingly asserted jurisdiction over an action to collect on a contract, where two non-Indians living off the reservation were hired by an Indian attorney to perform services both on and off the reservation, id., and an action to collect on a loan made off the reservation to an Indian, Little Horn State Bank v. Stops, 170 Mont. 510, 555 P.2d 211 (1976), cert. denied, 431 U.S. 924 (1977).

The federal district court held the "significant contacts" rationale applicable in a case similar to this one, R.C. Hedreen Co. v. Crow Tribal Housing Authority, 521 F. Supp. 599, 606 n.4 (D. Mont. 1981).8/ We disagree with the court's analysis. In determining the locus of a contract dispute, courts generally look to (1) the place of contracting, (2) the place of negotiation of the contract, (3) the place of performance, (4) the location of the subject matter of the contract, and (5) the

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8/ The district court pointed to the following facts:

> (1) the contracts were made with non-Indian entities residing off the reservation, (2) they contemplated the procurement of supplies and labor off the reservation, (3) bids for the work were solicitated off the reservation, (4) the plaintiff executed the contracts off the reservation, and (5) the bond essential to the contracts was procured and signed off the reservation.

521 F. Supp. at 606 n.4.

place of residence of the parties, evaluating each factor according to its relative importance with respect to the dispute. Restatement (Second) of Conflict of Laws § 188(2) (1971). When a contract concerns a specific physical thing, such as land or a chattel, the location of the thing is regarded as highly significant. Id. § 188 comment e; see also id. §§ 189-91. Here, as in Hedreen, the contract involved housing to be built on the reservation, to be occupied by reservation members and paid for by an agency representing the tribe. We think these factors determine the locus of the dispute, although workers, supplies, and the construction bond would have to come in from off the reservation. There were thus no "substantial activities giving rise to a dispute" arising outside the reservation.

In re Bertelson, 617 P.2d 121, 125 (Mont. 1980). Thus, the "significant contacts" test is not met here.

V. Conclusion

We hold that the plaintiffs have not stated a federal claim for which relief can be granted, and any determination of whether diversity jurisdiction exists will have to await a decision by the Fort Belknap Community Court on jurisdiction over this controversy. Accordingly, the judgment of the district court is reversed.

REVERSED and REMANDED.

APPENDIX C

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between--

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and

of the State where it has its principal place of business: Provided further, That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action

authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

25 U.S.C. § 1301. Definitions

For purposes of this subchapter, the term--

(1) "Indian tribe" means any tribe, band, or other group of Indian subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative, and judicial, and all offices,

bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.

25 U.S.C. § 1302. Constitutional rights

No Indian tribe in exercising powers of self-government shall--

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the

place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty

or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill or attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

25 U.S.C. § 1303. Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian Tribe.

25 U.S.C. § 1311. Model code

The Secretary of the Interior is authorized and directed to recommend to the Congress, on or before July 1, 1968, a model code to govern the administration of justice by courts of Indian offenses on Indian reservations. Such code shall include provisions which will (1) assure that any individual being tried for an offense by a court of Indian offenses shall have the same rights, privileges, and immunities under the United States Constitution as would be guaranteed any citizen of the United States being tried in a Federal court for any similar offense, (2) assure that any individual being tried for an offense by a court of Indian offenses will be advised and made aware of his rights under the United States Constitution, and under any tribal constitution applicable to

such individual, (3) establish proper qualifications for the office of judge of the court of Indian offenses, and (4) provide for the establishing of educational classes for the training of judges of courts of Indian offenses. In carrying out the provisions of this subchapter, the Secretary of the Interior shall consult with the Indians, Indian tribes, and interested agencies of the United States.

25 U.S.C. § 1312. Authorizaton of appropriations

There is hereby authorized to be appropriated such sum as may be necessary to carry out the provisions of this subchapter.

25 U.S.C. § 1321. Assumption by State of criminal jurisdiction

(a) Consent of United States; force and effect of criminal laws

The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by

or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, and use of property; hunting, trapping, or fishing

Nothing in this section shall authorize the alienation, encumbrance, or taxation of

any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

25 U.S.C. § 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private

persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

(b) Alienation, encumbrance, taxation, use, and probate of property

Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to

possession of such property or any interest therein.

(c) Force and effect of tribal ordinances or customs

Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

25 U.S.C. § 1323. Retrocession of jurisdiction by State

(a) The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28,

or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

25 U.S.C. § 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of

this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

25 U.S.C. § 1325. Abatement of actions

(a) No action or proceeding pending before any court or agency of the United States immediately prior to any cession of jurisdiction by the United States pursuant to this subchapter shall abate by reason of that cession. For the purposes of any such action or proceeding, such cession shall take effect on the day following the date of final determination of such action or proceeding.

(b) No cession made by the United States under this subchapter shall deprive

any court of the United States of jurisdiction to hear, determine, render judgment, or impose sentence in any criminal action instituted against any person for any offense committed before the effective date of such cession, if the offense charged in such action was cognizable under any law of the United States at the time of the commission of such offense. For the purposes of any such criminal action, such cession shall take effect on the day following the date of final determination of such action.

25 U.S.C. § 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting

at a special election held for that purpose. The Secretary of the Interior shall call such special election undr such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

25 U.S.C. § 1331. Approval

Notwithstanding any other provision of law, if any application made by an Indian, Indian tribe, Indian council, or any band or group of Indians under any law requiring the approval of the Secretary of the Interior or the Commissioner of Indian Affairs of contracts or agreements relating to the employment of legal counsel (including the choice of counsel and the fixing of fees) by any such Indians, tribe, council, band, or group is neither granted nor denied within ninety days following the

making of such application, such approval shall be deemed to have been granted.

25 U.S.C. § 1341. Authorization of Secretary

(a) Revision of document on "Indian Affairs, Laws and Treaties" and treatise on "Federal Indian Laws"; compilation of official opinions; printing and republication

In order that the constitutional rights of Indians might be fully protected, the Secretary of the Interior is authorized and directed to--

(1) have the document entitled "Indian Affairs, Laws and Treaties" (Senate Document Numbered 319, volumes 1 and 2, Fifty-eighth Congress), revised and extended to include all treaties, laws, Executive orders, and regulations relating to Indian affairs in force on September 1, 1967, and to have such revised document printed at the Government Printing Office;

(2) have revised and republished the treatise entitled "Federal Indian Law"; and

(3) have prepared, to the extent determined by the Secretary of the Interior to be feasible, an accurate compilation of the official opinions, published and unpublished, of the Solicitor of the Department of the Interior relating to Indian affairs rendered by the Solicitor prior to September 1, 1967, and to have such compilation printed as a Government publication at the Government Printing Office.

(b) Current services

With respect to the document entitled "Indian Affairs, Laws and Treaties" as revised and extended in accordance with paragraph (1) of subsection (a) of this section, and the compilation prepared in accordance with paragraph (3) of such subsection, the Secretary of the Interior shall take such action as may be necessary

to keep such document and compilation current on an annual basis.

(c) Authorization of appropriations

There is authorized to be appropriated for carrying out the provisions of this subchapter such sum as may be necessary.